United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2376

To be argued by
MICHAEL Q. CAREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2376

UNITED STATES OF AMERICA,

Appellee,

—v.—

DREW LORD DEVEREAUX,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Drew Lord Devereaux appeals from a judgment of conviction entered on September 10, 1974, in the United States District Court for the Southern District of New York following a three day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 1056, filed November 19, 1973, charged Devereaux with one count of failing to keep his local Selective Board advised of an address where mail would reach him, in violation of Title 50 App., United States Code, Section 462(a) and 32 C.F.R., Sections 1641.1 and 1641.3.

Devereaux's trial began on May 29, 1974 and, on May 31, 1974, the jury found him guilty.

On September 10, 1974, Judge Brieant sentenced Devereaux as a young adult offender pursuant to Title 18, United States Code, Section 5010 as extended by Title 18, United States Code, Section 4209, and pursuant to Title 18, United States Code, Section 5010(e), ordered Devereaux committed to the custody of the Attorney General for observation and study, a report of the findings of such observation and study to be made to the Court by the Youth Correction Division of the Board of Parole within 60 days. The Court expressly stated that sentence was imposed without prejudice to action taken by the President regarding amnesty. Execution of sentence was stayed pending appeal.

Devereaux is presently released on a $2500 Personal Recognizance Bond cosigned by his father.

Statement of Facts

The Government's Case

The Government proved at trial that from on or about June 6, 1972 to on or about September 7, 1973, Drew Lord Devereaux wilfully failed to keep his local Selective Service board advised of an address where mail would reach him.

Devereaux registered with Selective Service local board 8 in Suffolk County, New York, on July 3, 1970 (GX 1).* At the time of Devereaux's registration, each registrant was advised that he had an obligation to advise the local board of any change in his status within ten days after it occurred (Tr. 27). It was also the practice at the time of Devereaux's registration to give each registrant when he registered a pamphlet entitled "Selective Service and You" (GX 3; Tr. 30-31). On July 17, 1970, the local board mailed Devereaux his registration certificate (GX 4; Tr. 33). At the same

* Citations preceded by "GX" refer to Government exhibits in evidence at trial and those preceded by "Tr." refer to pages of the transcript of trial.

time, the local board mailed Devereaux a classification questionnaire (GX 2A; Tr. 34).

The pamphlet, registration certificate and classification questionnaire (GX 3, 4 and 2A) each advised Devereaux of his obligation to report to his local board any change in his address. The pamphlet also advised that his primary obligation was to keep his local board informed of his mailing address at all times (GX 3).

Devereaux signed and dated the completed classification questionnaire on September 4, 1970 and it was received by the local board four days later (GX 2A, Tr. 34). In the classification questionnaire Devereaux specified 944 Park Avenue, New York, New York as his current mailing address and identified Ian Henderson, 944 Park Avenue, New York, New York, his uncle, as the person who would always know his address. In an addendum to the Classification Questionnaire, Devereaux stated he was moving to Dayton, Ohio and would send the local board his address upon arrival (GX 2A; Tr. 35-36).

On April 18, 1971, Devereaux was classified 1A, (available for military service) (Tr. 38). Three days later a Notice of Classification (GX 5) was mailed to Devereaux which advised him that he was required by law to notify his local board within 10 days of every change in his address (Tr. 37). On November 9, 1971, the local board received a notice of change of address from Devereaux, dated October 8, 1971 (GX 20; Tr. 39). The letter advised the local board that Devereaux would be living in Cleveland, Ohio and attending high school there and it requested the local board to send him the necessary forms to apply as a conscientious objector "c/o M.L. Stewart, Apt. 6, 2680 N. Moreland Blvd., Cleveland, Ohio 44120." On March 17, 1972, the local board mailed Devereaux the forms for a conscientious objector application, c/o M.L. Stewart in Cleveland (GX 2J; Tr. 40).

On May 10, 1972, the local board mailed a Current Information Questionnaire (GX 2E) to Devereaux c/o M.L. Stewart in Cleveland. On June 6, 1972, the letter was returned to the local board by the Postal Service with a forwarding address, "Try c/o Maurice Tabor, Huber Hts., Ohio (Near Dayton)" and stamped "Insufficient address" (Tr. 42).

On June 1, 1972, the local board mailed Devereaux an Order to Report For Armed Forces Physical Examination (GX 2F) c/o M.L. Stewart in Cleveland. This letter was also forwarded "Try c/o Maurice Tabor, Huber Hts. (Near Dayton) Ohio" and returned by the Postal Service stamped "Insufficient Address".

On June 30, 1972, the local board mailed a letter to Devereaux c/o M.L. Stewart in Cleveland (GX 2G) which was returned by the Postal Service on July 13, 1972 with the handwritten notation, "Return to Sender, No longer at this address" and stamped "Moved, Left No Address" (Tr. 43). A carbon copy of that letter was mailed to Ian Henderson, 944 Park Avenue, New York City, the person designated by Devereaux as the one who would always know his address, and it was not returned undelivered (Tr. 43). The letter, among other things, stated that Devereaux had been identified as failing to report for an armed forces physical examination on June 19, 1972.

On June 30, 1972, the local board also addressed a letter to Ian Henderson, requesting, among other things, his assistance in furnishing the local board with Devereaux's last known address (GX 2H; Tr. 44). Henderson replied "have not seen or heard from [Devereaux] since June '71. His parent's address is John Drew Devereaux, Post Office Box N-7776, Nassau, Bahamas."

On July 14, 1972, the local board mailed Devereaux an order to report for induction c/o M.L. Stewart in Cleveland.

The letter was returned undelivered, stamped "Unclaimed, addressee unknown" (GX 2I).

On August 7, 1972, the local board received the Special Form for Conscientious Objector mailed to Devereaux approximately five months earlier, on March 17, 1972 (GX 2J; Tr. 45). It was dated July 26, 1972 and identified his mailing address as the same one which the board had used unsuccessfully on May 10, June 1 and June 30, 1972, namely c/o M.L. Stewart in Cleveland (GX 2E, 2F, 2G; Tr. 46). The form also listed five people and their addresses as references regarding Devereaux's conscientious objector application.

On August 15, 1972, approximately one week after receiving the conscientious objector application listing Devereaux's mailing address as that in care of M.L. Stewart in Cleveland, the local board mailed a letter to Devereaux c/o M.L. Stewart in Cleveland (GX 2K). The letter was returned undelivered, stamped "Addressee unknown" (GX 2K; Tr. 48-49).

On September 14, 1972 the local board wrote to the five references provided by Devereaux in his conscientious objector application (GX 2J), using the addresses provided by him, in an attempt to learn Devereaux's last known address (GX 2L, 2M, 2N, 20). A letter to Devereaux's fiancee, Marsha Tabor, addressed 1724 Xenia Ave., Dayton, Ohio 45424, was returned undelivered, stamped "Addressee Unknown" (GX 2L, Tr. 51). The local board received a reply from Col. Anthony Castellano, New York Military Academy, giving 944 Park Avenue, New York City, Devereaux's parents' old address, as the last known address (GX 2M). Major Schneider, New York Military Academy, replied that he had not seen or heard from Devereaux since June 1970 (GX 2N).* The local board never received a

* Major Schneider's reply conflicted with statements by Devereaux's in his conscientious objector application. In it Devereaux

[Footnote continued on following page]

reply to the letter it wrote Devereaux's parents c/o Henderson, P.O. Box 1076, Lyfurd Cay, Nassau, Bahamas and the letter was never returned undelivered (GX 2O; Tr. 53).

On October 18, 1972, Devereaux was reported as a delinquent registrant to the United States Attorney, Southern District of New York (Tr. 53-54).

On September 6, 1973, Special Agent Robert A. Brawner, Federal Bureau of Investigation, located Devereaux c/o Martha Weng, 425 South Second Street, Miamisburg, Ohio where Devereaux admitted he had resided since August of 1973 (Tr. 78, 80, 88-89). Devereaux told Special Agent Brawner that from October, 1971 until March, 1972 he resided at 2680 North Moreland Boulevard, Apartment No. 6, Cleveland, Ohio with a friend, Mary Stewart.* Thereafter, Devereaux claimed to have lived at 1728 Carlisle Avenue in Dayton, Ohio with his then fiancee, Marsha Tabor, from March 1972 until September 1972 (GX 7; Tr. 88). According to the dates he gave Agent Brawner, it was while he resided with Marsha Tabor, on July 26, 1972, that Devereaux signed and dated his conscientious objector application and, on August 7, 1972, that the local board received it. The application identified Devereaux's mailing address as that c/o M.L. Stewart in Cleveland, the address he said he left at the end of February 1972. Moreover, in the conscientious objector application, Devereaux incorrectly identified Marsha Tabor's address as 1724 Xenia Avenue, Dayton, Ohio though he was living with her at the time, as he admitted to Special Agent Brawner, at 1728 Carlisle Avenue in Dayton (Tr. 88).

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stated: ". . . I have received no *response* at all from two of the people I used as references and while the others promised to write, I have received no letters and do not know whether you have or not. I intend to *press them once again for responses* . . ." (emphasis added) (GX 2J).

* At trial Devereaux said he lived with M.L. Stewart for no more than one week (Tr. 181).

Devereaux also told Special Agent Brawner, that, from October, 1972 until January, 1973, he resided at 1720 Brookline, Dayton, Ohio with Becky Tolman * and from January, 1973 to August, 1973 with Tom Heil, 4462 Fargo, Moraine, Ohio (GX 7; Tr. 88). Devereaux also told Special Agent Brawner that he had not received either a notice to report for a preinduction physical or to report for induction and that his failure to receive such notices may have been caused by the number of his residences in the past one and one half years (Tr. 89). Furthermore, Devereaux stated that he did not know he was required by law to keep his local draft board advised of his "current whereabouts" (Tr. 89) although he had been put on actual notice of his obligation to inform his local board of every change in his address at least four times (GX 3, 4, 2A and 5).

Special Agent Brawner arrested Devereaux on December 19, 1973 at which time he said Ian Henderson, 944 Park Avenue, New York City would be aware of his whereabouts (Tr. 92).

On January 28, 1974, Devereaux was interviewed in this courthouse by Assistant United States Attorney George Wilson. Devereaux's statement of his addresses differed from that he gave Special Agent Brawner, *inter alia*, in that he told Brawner that from October, 1971 until March, 1972 he resided at 2680 North Moreland Boulevard in Cleveland, with Mary Stewart (Tr. 88) but told Wilson that during that period he lived with his parents at 944 Park Avenue, New York City (Tr. 129).** Devereaux also told Wilson, as he had told Special Agent Brawner, that from February, 1972 until August, 1972, he lived on Carlisle Avenue, Dayton, Ohio, possibly at street number 1724. This was the

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* At trial Devereaux said he lived with Marsha Tabor through the end of December, 1972 (Tr. 261-262).

** Devereaux gave yet a third version during his testimony during trial. (See Defense Case, *infra*).

residence he shared with Marsha Tabor and which he had identified as 1724 Xenia Avenue in listing Marsha Tabor as a reference in his conscientious objector application.

The Defense Case

Devereaux learned of his obligation to keep his local board informed of his mailing address on the day he registered with the Selective Service, July 3, 1970, and he was aware of his obligation to notify the local board of any change in address, of his current address and of an address through which mail could reach him. Furthermore, he had notified the local board of an address through which mail would reach him (Tr. 167-168, 200-201, 205, 206). Devereaux said that his statement to Special Agent Brawner that he did not know he was obligated to keep his local board informed of his "whereabouts" referred only to the period after December, 1972 when Devereaux believed the draft had ended and with it his obligation to keep the local board advised of his address changes (Tr. 184-186).

Devereaux called the local board on August 13, 1970, and told them that his uncle, Ian Henderson, would arrange to forward his mail to him, that is, that he would give Henderson an address to which he could forward his mail (GX 2R).

In his Classification Questionnaire, dated September 4, 1970 (GX 2), Devereaux stated he was moving to Ohio and that he would notify the local board of his address when he got there. However, from the time of his arrival in Dayton, Ohio in 1970 until October 8, 1971, he never did so (Tr. 208-209). Moreover, during that period, Ian Henderson, the person Devereaux designated as the one who would always know his address, did not know it at all times (Tr. 211).

Devereaux acknowledged that he received the Notice of Classification mailed to him on April 21, 1971 (GX 2A) and was aware that he had been classified 1A, available for service (Tr. 224), knew of the lottery system and once had learned his lottery number (Tr. 231, 232).

During the summer of 1971, Devereaux lived in Florida but he may not have informed Ian Henderson of his mailing address there (Tr. 213-214, 226). Between June or July, 1971 until July, 1973 Devereaux did not tell Henderson his current mailing address (Tr. 226).

From October 1971 until late February or early March 1972, Devereaux lived in Cleveland (Tr. 181). On October 8, 1971, Devereaux informed the local board that he had been living with his family in the Bahamas since the Spring of 1971 and asked that a conscientious objector application be sent to him c/o M. L. Stewart, Apt. 6, 2680 N. Moreland Blvd., Cleveland, Ohio 44120 (GX 2D). Devereaux admitted that that part of his letter which stated he had been living in the Bahamas since the Spring was untrue (Tr. 215-216).

During a period of approximately five months while Devereaux lived in Cleveland, he had three residences, including that of M. L. Stewart, but lived with M. L. Stewart herself for no more than one week (Tr. 181, 198-200).

When he left Cleveland, Devereaux resided with Marsha Tabor, then his fiancee, at 1720 or 1724 Carlisle Avenue, Dayton, Ohio until September, 1972 (Tr. 193-197). He lived with her at another address in Dayton through December, 1972 (Tr. 261).

In mid-March or early April, 1972, Devereaux wrote M. L. Stewart in Cleveland and asked her to forward all his mail to the home of his fiancee's parents, c/o Maurice Tabor, 5611 Benedict Road, Huber Heights, Ohio. He made this arrangement despite the fact that his relationship with the Tabors at that time was bad and, in fact, had never been

very good (Tr. 183-184, 234). Devereaux never informed his local board about this change of mailing address (Tr. 217-218). It was at the Tabor's address, however, albeit approximately three months later, that Devereaux claimed to have found the conscientious objector application mailed to him by the local board on March 17, 1972 (GX 2J; Tr. 184). Nevertheless, when Devereaux returned his conscientious objector application to the local board, dated July 26, 1972, he listed his mailing address as M. L. Stewart in Cleveland, an address in a city from which he had moved approximately 5 months earlier (GX 2J), and not his mailing address, c/o Maurice Tabor, Huber Heights, Ohio (Tr. 249).

During the period of the indictment, June 6, 1972 to September 7, 1973, Devereaux had four or five permanent residences and, simultaneously, seven to ten temporary residences (Tr. 177-178) and his father testified that Devereaux called him at least nine times during this period, informing him of a new address each time (Tr. 141, 152, 155).

On September 14, 1972, the local board sent a letter to Devereaux's parents in the Bahamas, addressed c/o Henderson P.O. Box 1076, Lyfurd Cay, Nassau, Bahamas asking information on Devereaux's last known address (GX 20). Devereaux's father testified that neither he, his wife nor his in-laws, Sir Guy Henderson, the former Chief Judge of the Bahamas, and Lady Henderson, ever received the letter. Devereaux's father testified that he, his wife and the Hendersons lived in Lyfurd Cay, a development on New Providence Island, Bahamas, but that at the time the letter was mailed to him, the post office box for all residents of Lyfurd Cay had changed from P.O. Box 1076 to P.O. Box N-7776 (Tr. 137-138, 140, 145-146, 149-150).

Devereaux's father also testified, however, that although he had had at least two residences in Lyfurd Cay since he

moved there in 1971, his mail box at Lyfurd Cay had remained box number 18, despite the change in post office boxes for the development itself, and that the letter to him from the local board (GX 20) was addressed in such a way that under ordinary circumstances it should have reached him (Tr. 148-150). Furthermore, in the summer of 1973, Devereaux's parents acknowledged that they had just received a letter from their son which he had addressed with the same post office box number as the local board had used in its September 14, 1972 letter (Tr. 203-204).

At the end of December, 1972, Devereaux's engagement to Marsha Tabor ended and thereafter he did not see or contact her parents again (Tr. 261-262). In January, 1973, Devereaux moved to Moraine, Ohio (Tr. 182).

Government's Rebuttal Case

Archie Spiegelman of the Selective Service testified that the ending of the draft in December, 1972 did not terminate Devereaux's obligation to keep the local board advised of his current address (Tr. 295-296).

ARGUMENT

POINT I

JUDGE BRIEANT DID NOT UNLAWFULLY AMEND THE INDICTMENT.

Devereaux argues that Judge Brieant unlawfully amended the indictment by striking the words "in writing". His argument has no merit.

The indictment in this case charged as follows:

> "The Grand Jury charges:
>
> From on or about the 6th day of June, 1972, to on or about the 7th day of September, 1973, in the

> Southern District of New York, DREW LORD DEVEREAUX, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, required to keep his local board currently informed in writing of the address where mail would reach him, unlawfully and knowingly did fail, neglect and refuse to keep his local board advised of the same.
>
> (Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1641.3, 1641.1.)"

At the beginning of the trial, defense counsel moved to strike the words "in writing" from the indictment because, he said, the provision in the law imposing a duty on a registrant to keep his local board advised of the address where mail would reach him did not include a requirement that he do so in writing. The Government asserted that it would prove that Devereaux failed to keep his local board properly informed either orally or in writing, and defense counsel added, "We will not take the position that we gave oral notice as opposed to written notice" (Tr. 3-4). The Court denied the motion to strike.

After the taking of evidence was completed, the following further colloquy on the issue took place:

> "The Court: . . . . You had an application at the beginning of the trial, Mr. Dworkin, about the "in writing" provision of the first page of the indictment. It was your suggestion or request, if I recall, that not be read to the jury. I wonder if you would restate your position on that, because I have been thinking about it, and I think perhaps I ought to hear you further on that.

Mr. Dworkin: Certainly I would move to dismiss the indictment if I am in a position to do so on that basis, but the real objection is that there is no such requirement that any notification be in writing. It is not that there is an issue of whether notification was in writing or not in this case. It is just that if we had read requirements that are not in issue to a jury, it may confuse them and somewhere along the line someone may think that the defendant did not comply with it, whether there is evidence of that or not.

The Court: Do you still contend that I ought not to read the "in writing"?

Mr. Dworkin: Yes.

The Court: I think you may have a point there. I am prepared to go along with that request.

Mr. Carey: Your Honor, the Government has no objection.

The Court: All right.

Mr. Dworkin: As I recall, you did not read it——

The Court: I have not read the indictment.

Mr. Dworkin: — at the beginning of the case, and no mention was made of the "in writing."

The Court: No. It was of some concern to me, and I wanted to give it further thought and I had not had a chance to read that Tenth Circuit case which you had.

Mr. Carey: It is clearly not in the regulation, your Honor. That is the reason for my consenting.

The Court: All right. It is confusing; that is the main thing." (Tr. 312-314).

Thereafter, the Court read the indictment and instructed the jury as if the words "in writing" did not appear in the indictment.

As a preliminary matter, it seems clear that Devereaux is foreclosed from asserting now either that the inclusion of the words "in writing" in the indictment required its dismissal or that the striking of the words "in writing" was an impermissible amendment of the indictment. Despite Devereaux's tortured reading of the record (Br. at 17),* it is clear that no motion to dismiss the indictment was ever made; the reason the trial judge did not rule on a motion to dismiss is that Devereaux did not make one. His present claims about the indictment's defectiveness—before or after "in writing" was struck—come too late. *United States* v. *Fistel*, 460 F.2d 157, 160-162 (2d Cir. 1972); *United States* v. *Miller*, 245 F.2d 486 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957); *Hanovich* v. *Sachs*, 290 F.2d 798, 799 (6th Cir.), *cert. denied*, 368 U.S. 863 (1961); *United States* v. *Williams*, 203 F.2d 572, 573 (5th Cir.), *cert. denied*, 346 U.S. 822 (1953); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962); *United States* v. *Garnes*, 156 F. Supp. 467 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959); *cf. United States* v. *Kelly*, 395 F.2d 727 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968); *United States ex rel. Morrison* v. *Foster*, 175 F.2d 495 (2d Cir. 1949).

Second, since the striking of the words "in writing" was done on Devereaux's motion, he is hardly in a position to complain that the trial court committed reversible error for doing what Devereaux specifically and *sua sponte* requested. *United States* v. *Edwards*, 465 F.2d 943, 950 (9th Cir. 1972).**

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* Citations preceded by "Br." refer to the pages of the Defendant-Appellant's brief.

** Devereaux relies on *Crosby* v. *United States*, 339 F.2d 743 (D.C. Cir. 1964) as authority for the proposition that an imper-

[Footnote continued on following page]

Moreover, the underpinning of Devereaux's argument on appeal is that the grand jury ". . . charged him with failure to keep the board so advised 'in writing'" (Br. at 14). However, the indictment, while, to be sure, reciting that Devereaux had a duty "to keep his local board informed in writing of the address where mail would reach him," did not charge Devereaux with failure to keep the local board informed *in writing* of an address where mail would reach him; it simply charged that Devereaux ". . . did fail, neglect, and refuse to keep his local board advised of the same." In short, the indictment can fairly be read to have charged Devereaux with failing to advise the local board *in any manner* of a current mailing address, a view which it appears the trial court (Tr. 3) and defense counsel below held and which is clearly the proper construction of the charging language of the indictment.

Moreover, even if the indictment were construed as Devereaux would have it—that it charged him with failing to keep the local board advised *in writing* of a current address—it is by no means the case that he was entitled to have the words "in writing" stricken. The indictment thus construed charged that Devereaux had failed to keep his local board currently informed in writing of the address where mail would reach him from June 6, 1972 to September 7, 1973. *United States* v. *Fisher*, 456 F.2d 1143 (10th Cir. 1972), on which Devereaux relied below for his motion to strike the words "in writing" (Tr. 2), concluded that the regulation applicable during the period relevant in that case did not provide that the information required about a registrant's current mailing address had to be furnished in writ-

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missible amendment to an indictment cannot be justified by the consent of the defendant, and certainly *Crosby* supports his position. However, in *Crosby* the amendment was not made on application of the defendant, and in *Stirone* v. *United States*, 361 U.S. 212 (1960), on which *Crosby* relies, the "amendment" was made over the objection of the defendant.

ing. However, the regulation applicable in *Fisher*, 32 C.F.R. § 1641.3, was modified and recodified September 2, 1972, effective on that date, 37 F.R. 17966, to require as 32 C.F.R. § 1641.1 that a registrant furnish current information *in writing* of an address where mail would reach him. Thus, the defect in the indictment was at most that for the period June 6, 1972 to September 2, 1972, when 32 C.F.R. § 1641.1 became effective in its present form, the indictment charged a duty to keep the local board informed of a current mailing address *in writing*, when the requirement of a writing did not exist.

The net effect of the matter is that, if the indictment meant, as Judge Brieant properly construed it, that from June, 1972, to September, 1973, Devereaux failed to keep his local board advised in any fashion of his current mailing address, it adequately charged an offense under the two regulations variously in force during that period,* and the striking of the words "in writing" as surplusage—particularly on the motion of the defense—was plainly permissible. See, e.g. *United States* v. *Cirami*, Dkt. No. 74-1492 (2d Cir., January 24, 1975), slip op. at 6050-6052; *United States* v. *Colasurdo*, 453 F.2d 585, 590 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Stone*, 282 F.2d 547, 553-554 (2d Cir.), *cert. denied*, 364 U.S. 928 (1960).

Interpreting the indictment as Devereaux does now, it is equally clear that he is not entitled to complain of the striking of the words "in writing." The indictment properly charged a violation of 50 App. U.S.C. § 462(a) and 32 C.F.R. § 1641.1 (effective September 2, 1972). Its only defect was that it embraced in the charging language a three month period during which its predecessor, 32 C.F.R. § 1641.3, which did not require a writing, was effective.

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* The 1972 amendments to this portion of the Code of Federal Regulations did no more than restrict to the making of a written notification the way in which a registrant could fulfill the duty imposed.

Since the indictment before its amendment properly charged the crime of which Devereaux was convicted, the inclusion of the period June-September, 1972, in the indictment was at most a defect properly treatable as a variance which was non-prejudicial, *United States* v. *Krepper*, 159 F.2d 958, 964 (3d Cir. 1946), *cert. denied*, 330 U.S. 824 (1947), and curable by a limiting instruction when the case went to the jury, *United States* v. *Edwards*, *supra*. That Judge Brieant adopted an alternative course on Devereaux's motion by striking "in writing" not only protected Devereaux's rights for the period when 32 C.F.R. § 1641.3 was in effect, it substantially increased the proof required of the Government for the greater period charged in the indictment, when 32 C.F.R. § 1641.1 was in force; the removal of the words "in writing" narrowed the scope of the indictment, required the Government to establish no notification of the draft board of any kind during the period of September, 1972 to September, 1973, and increased the defenses available to Devereaux. *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Colasurdo*, *supra*, 453 F.2d at 590.

Nor does the trial judge's action fall afoul of *Ex Parte Bain*, 121 U.S. 1 (1887), on which Devereaux places his principal reliance. As this Court held in *United States* v. *Cirami*, *supra*, slip op. at 6052:

> "This Court has viewed *Bain* as holding that some deletions of unnecessary language may work an impermissible 'fundamental change in the charge set forth in an indictment, even though a legally sufficient allegation remains. See *United States* v. *Colasurdo*, *supra*, 453 F.2d at 590. That type of change, involving the disregard of language that might well have had a significant bearing on the grand jury's decision to indict, may still violate the *Bain* rule. Even this interpretation of *Bain* may have been eroded by the Supreme Court's opinion in *Stirone* v.

> *United States, supra,* which interpreted *Bain* as standing for 'the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.' 361 U.S. at 217. This view appears to express concern only with the addition of charging language, rather than its deletion."

The underpinning of *Bain*—that without the deleted language the Grand Jury might not have indicted the defendant—has no application here since the indictment as returned properly and adequately charged the crime of which Devereaux was convicted. Judge Brieant's action on Devereaux's request "simply withdrew a portion of the charge as laid; the offense remained the same . . ." *United States* v. *Walters*, 477 F.2d 386, 388 (9th Cir.), *cert. denied*, 414 U.S. 1007 (1973). See also *United States* v. *Nuccio*, 315 F.2d 627 (2d Cir. 1963); *Overstreet* v. *United States*, 321 F.2d 459, 461 (5th Cir. 1963) (Lumbard, *C.J.*), *cert. denied*, 376 U.S. 919 (1964); *United States* v. *Musgrove*, 483 F.2d 327, 338 (5th Cir.), *cert. denied*, 414 U.S. 1023, 1025 (1973); *United States* v. *Griffin*, 463 F.2d 177, 178 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972); *Marsh* v. *United States*, 344 F.2d 317, 319-322 (5th Cir. 1965); *United States* v. *Krepper*, *supra*, 159 F.2d at 971.

Even if Judge Brieant had unlawfully amended the substance of the indictment, reversal of Devereaux's conviction is unwarranted since Devereaux has failed to show how he was prejudiced by the amendment. *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563, 571-572 (2d Cir. 1961); *cf. United States* v. *Rose*, 424 F.2d 1051, 1052 (6th Cir. 1970); *United States* v. *Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States* v. *Clark*, 416 F.2d 63 (9th Cir. 1969); *United States* v. *Owens*, 334 F. Supp. 1030 (D. Minn. 1971). At trial Devereaux claimed that the words "in writing" were

unnecessary and would prejudice him if read to the jury (Tr. 2, 5). Now he claims that striking the words, at his request, prejudiced him. Devereaux should not be permitted to have it both ways, particularly since the issue of how notice was given by Devereaux was not raised by him (Tr. 4). He argued to the jury that he had provided the local board with a forwarding address through which mail could reach him, and, alternatively, any failure on his part to do so was not wilful. The Government argued, and proved, that Devereaux intentionally failed to notify the local board as required either in writing or any other way (Tr. 14). Furthermore, Devereaux's claim of prejudice is founded on a faulty analysis of the effect of Judge Brieant's amendment. He claims that the amendment eliminated a defense which he might have raised but he fails to identify such defense. In fact, Judge Brieant's action had the opposite effect by increasing the defenses available to Devereaux. If the indictment were to be read as Devereaux claims the Grand Jury intended it, then he could have satisfied his obligation to the local board only by notice in writing of a current address where mail would reach him. As the indictment of the Grand Jury charged in fact, both before and after Judge Brieant's amendment, Devereaux could establish that he satisfied his obligation to the local board not only by notice in writing but by any other means possible. Thus, any amendment of substance increased rather than limited Devereaux's defenses and did not prejudice him in any way. *Cf. Williams* v. *United States*, 179 F.2d 656, 659 (5th Cir. 1950), *aff'd*, 341 U.S. 97 (1951).

Devereaux seems to claim that Judge Brieant's action deprived him of raising on appeal the argument that the conviction should be reversed since the indictment was defective. Devereaux's claim that there was no requirement that he notify the board in writing of an address where mail would reach him overlooks the fact that he did have such a legal duty under 32 C.F.R. § 1641.1 and that, in any

event, he was neither charged nor tried for that offense. Moreover, the cases upon which he relies are inappropriate since the defenses they speak of as lost to the defendant by an amendment, thereby prejudicing him and warranting reversal of the conviction, are defenses on the merits. *United States* v. *Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940); *United States* v. *Owens*, *supra*, 334 F. Supp. at 1032. Devereaux clearly did not lose a defense on the merits as a result of the amendment.

POINT II

THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEVEREAUX GUILTY AND JUDGE BRIEANT'S CHARGE WAS PROPER.

Devereaux claims that there was insufficient evidence to convict him because he provided the local board with the required chain of forwarding addresses, and, if not, there was insufficient evidence that he deliberately failed to do so. The verdict of the jury must be sustained since, viewed in the light most favorable to the Government, the evidence of Devereaux's knowing and wilful failure to satisfy his obligation was sufficient to support it. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Mingoia*, 424 F.2d 710, 712 (2d Cir. 1970); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).*

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* Devereaux claims that Judge Brieant should have granted his motion for acquittal pursuant to Rule 29, Fed. R. Crim. Pro. at the end of the Government's case (Br. 26). However, since Devereaux offered evidence after his motion was denied at the close of the Government's case, the sufficiency of the evidence must be evaluated in the light of all the evidence. *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3349 (December 16, 1974). *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973), *cert. denied* 415 U.S. 984 (1974).

Although Devereaux was not required to remain at any particular address or to report to the local board every move he made, he was obligated to keep the local board informed of a current good address. *Bartchy* v. *United States*, 319 U.S. 484, 488 (1943); *United States* v. *Read*, 443 F.2d 842, 844 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971); *United States* v. *Seligson*, 377 F. Supp. 638, 641 (S.D.N.Y.), *aff'd*, 497 F.2d 920 (2d Cir. 1974); *United States* v. *Williams*, 378 F. Supp. 159, 161 (S.D.N.Y. 1973). He did not do so. Devereaux failed to leave a chain of forwarding addresses by which mail sent to him might *reasonably have been expected to come into his hands in time for compliance*. *Bartchy* v. *United States*, *supra*, 319 U.S. at 489.

Devereaux admitted he knew of his obligation and argued that he fulfilled it by, among other things, providing the local board with the address of M.L. Stewart in Cleveland and, when he moved to Dayton, providing M.L. Stewart with the home address of his fiancee's parents, the Tabors, in Huber Heights, Ohio. He argues that this shows a "real effort" to comply with the law (Br. 26). On the other hand, he has not claimed that he provided Henderson, the person designated as the one who would always know his address during the period of the offense charged, with any change of forwarding address.

Devereaux did give the local board a good address for M.L. Stewart in Cleveland but he never provided it with another change of address, or another person who would know his address (Tr. 271), though he lived at that address for only one week during the 23 month period he lived in Ohio (Tr. 181). Devereaux testified that shortly after leaving Cleveland for Dayton he gave M.L. Stewart a complete forwarding address for the Tabors in Huber Heights, Ohio. However, the evidence proves otherwise. Three letters sent to M.L. Stewart and forwarded to Huber Heights, Ohio were returned to the local board undelivered, stamped "insufficient address" or "Moved, Left No Address" (GX 2E,

2F, 2G). Presumably to prove he gave Stewart a valid forwarding address, Devereaux testified that he received his conscientious objector application, mailed March 17, 1972, through the M.L. Stewart address in Cleveland, at the Tabor residence in Huber Heights (Tr. 184). The jury, on the other hand, could have rejected Devereaux's testimony and inferred that he received it at M.L. Stewart's in Cleveland where he said he lived until early March, 1972 (Tr. 197). *United States* v. *Blakely*, 491 F.2d 120 (5th Cir. 1974).

Devereaux not only failed to keep the local board advised of an address where mail would reach him but the evidence was sufficient to show, contrary to his claim on appeal, that he deliberately failed to meet that obligation. *Ward* v. *United States*, 344 U.S. 924 (1953); *United States* v. *Blakely*, 491 F.2d at 123; *United States* v. *Buckley*, 452 F.2d 1088, 1089 (9th Cir. 1971); *United States* v. *Couming*, 445 F.2d 555, 557 (1st Cir.), *cert. denied*, 404 U.S. 949 (1971).

Devereaux's conscientious objector application itself shows a deliberate attempt by him to mislead his local board. Admittedly knowing his obligation to keep the local board informed of a current address through which mail could reach him, approximately 4 months after leaving Cleveland, he listed as his address that of M. L. Stewart in Cleveland. He did not list either address where he had been living with Marsha Tabor for approximately 5 months and continued to live with her for another 5 months (Tr. 193, 197, 261) nor did he list the Tabors in Huber Heights. The address he claimed at trial was his mailing address (Tr. 183). The references provided by Devereaux in his conscientious objector application also show a deliberate plan to mislead the local board. Devereaux argues that he showed a "real effort" to comply with law by listing the names and addresses of five references, presumably because

they could have furnished the board with his address (Br. 26). However, the evidence establishes that Devereaux never expected the local board to learn from his references a current address through which mail could reach him.

Devereaux admitted during interviews by the FBI and by an Assistant United States Attorney, as well as at trial, that his address when he lived with Marsha Tabor in a house on the corner of Xenia Avenue and Carlisle Avenue in Dayton was on Carlisle Avenue (Tr. 195-196), yet approximately 5 months after he first moved there, he listed the address for Tabor, given as a reference on his conscientious objector application, as "1724 Xenia Avenue, Dayton, Ohio." The local board wrote Marsha Tabor at the address given by Devereaux and the letter was returned undelivered, stamped, "addressee unknown" (GX 2L).

Devereaux also provided as references two officers at New York Military Academy whom he knew when he attended high school there, stating in the body of his application (GX 2J at p. 3) that he was waiting for responses from them, thereby indicating that he had written to them in relation to his application. The local board wrote each of the officers. One replied by providing an outdated address for Devereaux's parents (GX 2M) and the other by stating that he had "not seen or heard from [Devereaux] since end of school year, June 1970 . . ." (GX 2N). Each officer thereby indicated not only that he was not expecting to write Devereaux in relation to his application but also that he did not have a current address to which to mail the response Devereaux was waiting for.

Devereaux also listed his parents as references and the local board wrote to them seeking assistance in locating him (GX 2O). The letter was never returned undelivered nor did the local board ever receive a reply to it. Devereaux admitted the address of his parents was changed by the time the local board wrote them but claims that but for the failure of the local board to address a letter to his

parents at their current address provided by Henderson (GX 2H), the local board would have reached his father and learned his address and that his obligation to provide a current mailing address was thereby satisfied. However, the obligation to provide a current address was Devereaux's not Henderson's. *Bartchy* v. *United States, supra*, 319 U.S. at 488, and the local board was not obligated to track down Devereaux. *Cf. Gretter* v. *United States*, 422 F.2d 315, 318 (10th Cir. 1970). More important, however, Devereaux never expected the local board to contact him through his parents. His father testified that through all the communications he had with his son, they never discussed whether his father had received any correspondence from the local board (Tr. 152). *Cf. United States* v. *Trypuk*, 136 F.2d 900, 902 (2d Cir. 1943); *United States* v. *Secoy*, 481 F.2d 225, 228 (6th Cir. 1973). Even if the references had provided clues by which he could have been located, Devereaux would not have substantially complied with his obligation. *United States* v. *Mostafavi-Kashani*, 469 F.2d 224 (9th Cir. 1972).

Devereaux claims he satisfied his obligation by providing the local board with the address of his uncle, Henderson, the person Devereaux designated as the one who would always know his address (Br. 24-27). Devereaux ignores the clear purpose for making such a designation as well as the evidence which confirms without question that Henderson did not often know Devereaux's address and never knew it during the period of the offense charged. Henderson replied to a letter of the local board on July 10, 1972 that he had not seen or heard from Devereaux for over one year (GX 2H). Devereaux himself admitted that the last time he contacted Henderson through September, 1973 was in June or July 1971 and that if he provided any address at that time it was to a temporary residence in Florida which he left in or about August, 1971 (Tr. 212-215, 270-271).

The pattern of Devereaux's conduct gave every indication of evasive tactics to avoid receiving mail from the local board. *United States* v. *Mostafavi-Kashani, supra,* 469 F.2d at 224. From June 1971 through September 1973, Devereaux never informed Henderson of his mail forwarding or residence address (Tr. 212-215, 270-271). Moreover, he failed to give the local board more than one address change between October 8, 1971 and September, 1973 though he had approximately 9 to 15 other residences and claimed one other mail forwarding address, the Tabors in Huber Heights, and he failed to change the name of the person who would always know his address (Tr. 141, 152, 155, 177-178, 192-200, 270-271).* Though he claimed to be moving about constantly, he lived with Marsha Tabor in Dayton for approximately 5 months at 1724 Carlisle Avenue, long enough by far to warrant giving that address to the local board (Tr. 197). In addition, though the address change Devereaux did give the local board, that of M. L. Stewart in Cleveland, was a valid residence address for only one week, he relied upon it in direct communications with the local board months after he left Cleveland (GX 2J).

Devereaux justified his failure to notify the local board of his address changes by claiming he gave a valid address to which M. L. Stewart could forward his mail, the Tabors in Huber Heights. However, the jury was entitled to disbelieve Devereaux and on the basis of the letters mailed to M. L. Stewart, then forwarded to Huber Heights and returned to the local board marked "insufficient address" and "moved, left no address," infer that Devereaux had not provided a valid forwarding address to Stewart but had acted in bad faith. *Bartchy* v. *United States, supra,* 319 U.S. at 489; *United States* v. *Hedges,* 449 F.2d 1289, 1290 (9th Cir. 1971).

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* Though the indictment charged the defendant with the offense for a period shorter than this, the entire period could be considered as additional evidence of Devereaux's wilful failure to comply. *United States* v. *Read,* 465 F.2d 1118, 1120 (9th Cir. 1972).

Even if Devereaux did give M. L. Stewart a complete address for the Tabors, nevertheless, the evidence shows he did so in bad faith. Devereaux admitted his relationship with the Tabors, whose daughter he was living with elsewhere, was bad at the time he relied upon their home as a forwarding address and had never been very good (Tr. 183-184, 234, 262). Given such a relationship, when he made the arrangement, reasonably he could not have expected the Tabors to forward his mail. Indeed, they did not do so and his continuing reliance upon their address (see GX 2J) as a forwarding address after he realized they were not forwarding his mail to him, (Devereaux testified he found his conscientious objector form (GX 2J) at the Tabors approximately three months after it was mailed (Tr. 184)) establishes beyond any doubt that he was trying deliberately to avoid any notice from his local board.

Finally, Devereaux did not provide any chain of addresses by which he could have expected correspondence from the local board to reach him *in time for compliance. Bartchy* v. *United States, supra*, 319 U.S. at 489; *cf. United States* v. *Secoy, supra*, 481 F.2d at 228. He testified that he did not see the Tabors regularly and when he did it may have been after as much as three weeks (Tr. 263). On the other hand, his claim that he did not find his conscientious objector application for approximately three months after it was allegedly mailed through M. L. Stewart to the Tabors suggests, if believed, that his contact with them was even more haphazard. Thus, if he had received, for example, the order of the local board that he report for physical examination, it would not have been possible for Devereaux to comply with it, since it required him to report within eighteen days of the date of the letter (GX 2F).

Devereaux alleges that he was prejudiced by Judge Brieant's charge regarding the ways in which he could satisfy his obligation to the local board (Br. at 24). Deve-

reaux claims that the charge confused the jury and misstated the law.

Devereaux has failed to show any basis indicating the charge confused the jury. His allegation is simply unsupported by fact or law.

The alleged misstatement of law was Judge Brieant's failure to charge that Devereaux could satisfy his obligation merely by giving the local board Henderson's address, regardless of whether Henderson knew where to forward Devereaux's correspondence, because Henderson "knew" the address for Devereaux's parents. Devereaux made no request to give the jury such a charge. Indeed such a charge would have misstated the law. Devereaux was required to keep the local board informed of an address through which mail would reach him in time for compliance. *Bartchy* v. *United States*, *supra*, 319 U.S. at 489; *Kokotan* v. *United States*, 408 F.2d 1134, 1137 (10th Cir. 1969). The record in this case plainly shows that although the local board had Henderson's address, Henderson did not know where to contact Devereaux (GX 2H).

Moreover, Devereaux's failure to object at trial to those portions of the charge he questions now and his failure to allege and show "plain error" affecting substantial rights alone preclude his raising the issue on appeal. Rule 30, Fed. R. Crim. Pro.; *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974); *United States* v. *Brawer*, 482 F.2d 117, 130 n. 18 (2d Cir. 1973); *United States* v. *Pellegrino*, 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States* v. *Martinez*, 446 F.2d 118, 120 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States* v. *Contreras*, 446 F.2d 940, 942 (2d Cir. 1971).

Devereaux has also failed to show how he was prejudiced by his other claim of error, namely, Judge Brieant's refusal to charge the jury that Henderson could be con-

sidered of such discretion that Devereaux might justifiably rely upon him to forward his mail to his father (Br. 26). The record is clear that Devereaux provided Henderson with no forwarding address (Tr. 212-215, 270-271). Moreover, Devereaux's testimony did not suggest that he relied upon Henderson to forward his mail to the Bahamas, where, in any event, he did not live. Indeed Devereaux's conceded failure to ask his father if he had received any mail from the local board, if believed, suggests that he did not expect Henderson to forward any mail to Devereaux's parents. Finally, Devereaux testified he was not using his parent's address as a forwarding address when he last contacted his uncle. Indeed, at that time he gave his uncle a forwarding address, if any, in Florida (Tr. 212-213). Absent any evidence sufficient to raise a question of fact regarding whether Devereaux relied upon Henderson to forward his mail to him, through his parents, it was not error for Judge Brieant to refuse to give the requested instruction. *United States* v. *Clark*, 498 F.2d 535, 537 (2d Cir. 1974); *United States* v. *Grant*, 462 F.2d 28, 35 (2d Cir. 1972), *cert. denied*, 409 U.S. 914 (1973); *United States* v. *Lozaw*, 427 F.2d 911, 916 (2d Cir. 1970); *United States* v. *Corallo*, 413 F.2d 1306, 1323 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). *Venus* v. *United States*, 266 F.2d 386, 389 (9th Cir. 1959).

POINT III

JUDGE BRIEANT'S INSTRUCTIONS ON INTENT WERE PROPER.

Devereaux argues that there was no evidence that he deliberately failed to satisfy his obligation of keeping the local board informed of an address through which mail could reach him and that Judge Brieant's charge permitted the jury to convict him for mere negligence. There is no merit to Devereaux's assertion and Judge Brieant properly

instructed the jury on intent. Title 50, App., United States Code, Section 462(a) *United States* v. *Trypuk*, *supra*, 136 F.2d at 901; *Kokotan* v. *United States*, *supra*, 408 F.2d at 1138; *United States* v. *Rumsa*, 212 F.2d 927, 933 (7th Cir.), *cert. denied*, 348 U.S. 838 (1954).

Devereaux bases his argument on Judge Brieant's use of the disjunctive in the phrase "failed or neglected" (Tr. 365).

Judge Brieant clearly told the jury that before they could convict Devereaux they had to find he "unlawfully, intentionally and knowingly" failed to keep his local board advised of the address where mail would reach him (Tr. 364, 366). Before Judge Brieant gave the questioned instruction to the jury, he defined "knowingly" in such a way as to expressly preclude a conviction based on mere negligence:

> "'Knowingly' as here used means deliberately, intentionally and understandingly. It is a persistent refusal to perform an act when one knows he is required to do so, and this definition is opposed to the idea of an inadvertent or an accidental failure to do any act or an innocent mistake." (Tr. 364-365).

Furthermore, that portion of the questioned instruction which Devereaux emphasizes, "failed or neglected", tracks the language of Title 50 App., United States Code § 462(a), under which Devereaux was charged.

Moreover, even if his instruction by itself was misleading, the error was harmless since the jury was also instructed that Devereaux could not be convicted if his failure to keep the local board informed of an address where mail could reach him was due to inadvertence, accident or innocent mistake. *Cf. United States* v. *Gutierrez*, 485 F.2d

1378, 1380 (9th Cir. 1973), *cert. denied* — U.S. — (1974); *United States* v. *Nielson*, 471 F.2d 905, 908 (9th Cir. 1973).

Finally, no exception on this point was taken below, and the defect asserted is hardly plain error. Rule 30, Fed. R. Crim. Pro.; *United States* v. *Pinto*, *supra*. Indeed, defense counsel's handwritten requests to charge, marked as Court's Exhibit 1, specifically suggested a charge coupling "neglect" and criminal intent as sufficient for conviction.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL Q. CAREY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24TH day of MARCH, 1975 he served a copy of the within BRIEF FOR THE U.S. of A. by placing the same in a properly postpaid franked envelope addressed:

JOHN E. LEMOULT, ESQ.
1345 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing OUTSIDE the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael Q. Carey
MICHAEL Q. CAREY

Sworn to before me this

24TH day of MARCH, 1975.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976